No. 83-1734

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. BALELO, ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.*, the Secretary of Commerce was authorized to issue a regulation requiring tunaboat operators, as a condition of their licenses, to allow government observers to accompany their vessels on regular fishing trips for the purpose of conducting research and collecting data that may be used in civil, criminal, and administrative proceedings.

2. Whether the authorized activities of the government observers violate the tunaboat captains' Fourth Amendment rights.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-35a) is reported at 724 F.2d 753. The opinion of the panel (Pet. App. 36a-47a) is unreported. The opinion of the district court (Pet. App. 48a-58a) is reported at 519 F. Supp. 573.

JURISDICTION

The judgment of the en banc court of appeals was entered on January 24, 1984. The petition for writ of certiorari was filed on April 23, 1984. The ju-

risdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Fourth Amendment; the Marine Mammal Protection Act of 1972, 16 U.S.C. 1377 and 1381; and 50 C.F.R. 216.24(f) are set forth at Pet. App. 60a-64a. Section 103(a) of the Marine Mammal Protection Act of 1972, 16 U.S.C. 1373(a), is set forth as an Appendix to this brief (App., *infra*, 1a).

STATEMENT

1. The Marine Mammal Protection Act of 1972 (the Act), 16 U.S.C. 1361 *et seq.*, was enacted to protect marine mammals to the greatest extent feasible commensurate with the health and stability of the marine ecosystem (16 U.S.C. 1361(6)). To this end, the Act established a moratorium on the taking and importation of marine mammals. The Secretary of Commerce is authorized to waive this moratorium (16 U.S.C. 1371(a)(3)(A)) and permit taking on a case-by-case basis pursuant to regulations promulgated in compliance with 16 U.S.C. 1373.[1] These regulations must be based upon the "best scientific evidence available" (16 U.S.C. 1373(a)). Permits waiving the Act's general moratorium, which are is-

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[1] The Secretary is vested by 16 U.S.C. 1373(a) with authority to

> prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal * * * as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent wtih the purposes and policies * * * of the Act.

sued pursuant to these regulations, must be based on an affirmative showing that the taking or importation would be consistent with the purposes of the Act (16 U.S.C. 1374(d)(3)). The permit itself must specify the number and kinds of mammals that are authorized to be taken or imported, the location and manner in which they are to be taken or imported, the period within which the permit is valid, and any other terms or conditions that the Secretary deems appropriate (16 U.S.C. 1374(b)(2)).

2. Before 1972, one of the most serious threats to marine mammals was posed by the method of fishing commonly used by tuna fishermen in the eastern tropical Pacific Ocean. For unexplained reasons, schools of yellowfin tuna and porpoises are often found together. The fishermen spot the porpoises on the surface, surround them with a net or seine, and pull the purse cable shut, closing the bottom of the net. The tuna swimming underneath the porpoises are captured, but porpoises also become entangled in the net and, since they are air breathing mammals, frequently drown. Before 1972, approximately 300,000 porpoises per year were killed in this way by American tunaboats. See 40 Fed. Reg. 41535 (1975).

3. In recognition of the serious effects that would have been produced by an immediate and strict application of the Act to the commercial tuna industry, Congress included a special two-year exemption in the Act, which authorized continued taking until 1974 of marine mammals incidental to commercial tuna fishing (16 U.S.C. (1976 ed.) 1371(a)(2)). In an attempt to enable the industry to comply with the Act by the end of the two-year period, Congress created a research program for the purpose of developing improved fishing methods and gear that would minimize the killing of porpoises during tuna fishing

operations (16 U.S.C. 1381(a)). Part of that program entailed the placement of observers on tunaboats to conduct research and observe operations (16 U.S.C. 1381(d)). This program, together with the industry's two-year exemption, expired in October 1974.

Since 1974, the Act has permitted marine mammals to be taken incidentally in the course of commercial fishing operations, but the Act conditions the issuance of permits for such takings on compliance with regulations promulgated by the Secretary in accordance with Section 103 of the Act. 16 U.S.C. 1371(a)(2). The Act specifically sets as its immediate goal "that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate; provided that this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable" (*ibid.*).

4. Prior to the expiration of the two-year exemption, the Secretary of Commerce, acting pursuant to Section 103 of the Act, promulgated regulations relating to the incidental taking of marine mammals in the course of commercial tuna fishing. These regulations, which took effect on September 30, 1974, provided for the placement of observers on domestic purse seine fishing vessels "for the purpose of conducting research or observation operations" (50 C.F.R. 216.24(f) (1974)). In response to litigation [2]

[2] *Committee for Humane Legislation, Inc.* v. *Richardson*, 414 F. Supp. 297 (D.D.C.), aff'd, 540 F.2d 1141 (D.C. Cir. 1976).

challenging permits issued under these provisions (41 Fed. Reg. 45015 (1976)), the regulations were revised. Quotas were placed on the permissible porpoise mortalities for each year, and permits waiving the Act's general moratorium on the taking of marine mammals were conditioned upon compliance with the observer program (42 Fed. Reg. 12012 (1977)).

These regulations were again revised effective November 28, 1980, and the specific regulation that is the subject of this litigation (50 C.F.R. 216.24(f) (1980)) was issued. That regulation provides that observers may accompany tuna vessels "for the purpose of conducting research and observing operations, including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions."

5. As the above chronology shows, a program of placing federal observers on board tunaboats has been conducted since 1972. The purpose of the original program, which took place from 1972 to 1974 under express statutory directive, was to enable the government to conduct research and observe operations for the purpose of improving fishing methods and gear (16 U.S.C. 1381(d)). The observer program adopted by the Secretary in 1974 as a condition for waiving the Act's general moratorium on the taking of marine mammals was instituted to assist the Secretary in carrying out his broader responsibilities under the Act. Under the regulation now in effect, each tunaboat must carry an observer on one or more fishing voyages each year. An annual schedule of observer placements is established and distributed well in advance, and the observers' functions are specified in a published manual and are discussed at a predeparture conference attended by the boat's captain and govern-

ment representatives. The observer is authorized to be present on deck and to record on standardized forms his observation of marine mammals encountered on the trip, including those that are pursued and encircled during the course of fishing operations. The observer is not authorized to observe or report on any other activities that may occur during the trip.

The information collected by the observer is used in several ways. It helps the Secretary in developing the terms of the general industry permit authorizing the incidental taking of marine mammals. It is used in the setting of quotas on the number of each species of marine mammals that may be taken. And it also provides a means of monitoring industry compliance with the prohibitions on incidental takings of depleted species (see 16 U.S.C. 1362(1)), as well as compliance with prescribed protective procedures.

6. Petitioners, who are tunaboat captains, brought suit against the Secretary of Commerce and others in the United States District Court for the Southern District of California, seeking declaratory and injunctive relief against the use in legal proceedings of information gathered by the observers. Petitioners argued that the observer program was contrary to the Marine Mammal Protection Act and a violation of their rights under the Fourth Amendment. The district court agreed. It first concluded (Pet. App. 50a) that since "there is boarding by governing agents who have, as one of their express purposes, the gathering of information for use in civil, criminal or forfeiture proceedings against the vessel or crew, their entry and presence on board must be deemed a search." The court then held (*id.* at 51a-55a) that such "searches," which are conducted without probable cause or a warrant, violate 16 U.S.C. 1377(d)

(2), which empowers an enforcement officer to search certain vessels and conveyances without a warrant if he has reasonable cause to believe that they are in violation of the Act or its regulations. The court also concluded (Pet. App. 53a-55a) that since the observers' activities affect substantial constitutional rights, an explicit congressional authorization, rather than an administrative regulation issued pursuant to a more general delegation of authority, was required. Finally, the court held (*id.* at 55a-57a) that the regulation violated the Fourth Amendment. The court declared the regulation unconstitutional insofar as it allowed the observers to gather information for use in civil, criminal, or administrative proceedings (Pet. App. 58a). The court also enjoined the government from using information gathered by the observers "for any purpose except scientific research" (*ibid.*).

7. A divided panel of the court of appeals affirmed the portion of the district court's order declaring the observer regulation invalid insofar as it allows the gathering of information for use in legal proceedings. In addition, the panel reversed the portion of the district court's order allowing observers to accompany fishing boats and gather data for scientific purposes. Pet. App. 44a.

The court of appeals then granted rehearing en banc and, reversing the panel, upheld the validity of the observer program. The court first held that the regulation establishing that program was authorized by statutes granting the Secretary of Commerce broad rulemaking authority to implement the Act (see 16 U.S.C. 1371, 1373). The court found that the regulation is consistent with the objectives and directives of the Act (Pet. App. 10a) and that effective implementation of the Act would be impossible without

using the information collected by observers in enforcement proceedings (Pet. App. 11a).

The court then held (Pet. 15a-21a) that the regulation does not violate the Fourth Amendment. Assuming arguendo that the activity of an on-board observer constitutes a search, the court found (Pet. App. 16a-21a) that the search was reasonable. Relying on cases upholding inspections of closely regulated industries without a warrant or probable cause (*id.* at 17a-18a), the court held (*id.* at 18a-19a) that the tuna industry has been closely regulated by Congress. The court also concluded (*id.* at 18a-19a) that the regulatory scheme of the observer program " 'provides a constitutionally adequate substitute for a warrant' " (*id.* at 19a, quoting *Donovan* v. *Dewey*, 452 U.S. 594, 603 (1981)). Finally, the court observed (Pet. App. 20a) that no "less restrictive alternative for obtaining the information exists."

Judge Pregerson concurred but stated in a separate opinion that, in his view, the observer program did not entail searches, since fishing operations occur "at sea on decks covered only by the sky and open to view by other crew members, nearby vessels, and overflying aircraft" (Pet. App. 21a). Judge Nelson, who also concurred, wrote separately "to emphasize the magnitude of the governmental interest involved in this case" (*id.* at 23a).

In dissent, Judges Tang and Ferguson stated that the promulgation of the regulation was not authorized by Congress (Pet. App. 23a-27a). Judge Canby joined them in concluding that the regulation violated the Fourth Amendment (see Pet. App. 23a, 28a-35a).

ARGUMENT

This case involves the application of undisputed legal principles to a unique factual situation. In our view, the court of appeals' application of those principles was correct, and its opinion clearly does not conflict with any decision of this Court or any other court of appeals. In any event, because of the singular factual setting of this case, the court of appeals' decision is very unlikely to have an appreciable effect in other situations. For all these reasons, further review by this Court is unwarranted.

1. Petitioners first contend (Pet. 10-13) that the regulation establishing the current observer program was not lawfully promulgated pursuant to the Act. They argue (Pet. 12-13) that the regulation is inconsistent with 16 U.S.C. 1377(d)(2), which authorizes warrantless searches to enforce the Act under certain circumstances. They also suggest (Pet. 12) that, contrary to the court of appeals' conclusion (Pet. App. 7a-15a), the Act does not authorize the Secretary to issue such a regulation. These arguments plainly lack merit.

a. The regulation at issue here (50 C.F.R. 216.24(f)), which authorizes federal observers to accompany certificated vessels and observe their fishing operations during certain voyages, is entirely consistent with 16 U.S.C. 1377(d)(2), which provides that any person authorized to enforce the Act

> may, in addition to any other authority conferred by law—* * *
>
> > (2) with a warrant or other process, or without a warrant if he has reasonable cause to believe that a vessel or other conveyance subject to the jurisdiction of the

> United States or any person on board is in violation of any provision of this subchapter or the regulations issued thereunder, search such vessel or conveyance and arrest such person.

First, 16 U.S.C. 1377(d)(2) concerns warrantless *searches*; for reasons explained below, the authorized activities of the observers are not searches.

Second, even if the observers' activities amount to searches, 16 U.S.C. 1377(d)(2), which *confers* authority "in addition to any other authority conferred by law," cannot possibly be read as a limitation on the authority to conduct otherwise lawful searches.

Third, again assuming that the observers conduct searches, 16 U.S.C 1377(d)(2) applies to a much broader category of searches. There is no inconsistency in permitting observers to accompany a vessel and make observations without having probable cause or reasonable suspicion, while requiring reasonable cause for one of the much broader category of searches authorized by 16 U.S.C. 1377(d)(2).

The regulation, as noted, merely authorizes federal observers to accompany "certificated vessels" on regular fishing trips "for the purpose of conducting research and observing operations" (50 C.F.R. 216.24(f)). "Certificated vessels" are those that use certain types of fishing gear that are likely to ensnare marine mammals. See 50 C.F.R. 216.24(b) and (c). By contrast, 16 U.S.C. 1377(d)(2) is not limited to on-board federal observers, but applies to any person authorized to enforce the Act, including other federal and state law enforcement officers, if designated by the Secretary (16 U.S.C. 1377(b)). Under 16 U.S.C. 1377(d)(2), the search is not limited to "certificated vessels" but may include any "vessel or other conveyance subject to the jurisdiction of the United States

or any person on board." Among other things, this provision would therefore permit a search of any vessel, land vehicle, or airplane, and any person on board for evidence of the illegal taking, importation, transportation, possession, or sale of a marine mammal or marine mammal product or evidence of the use of a prohibited method of fishing (see 16 U.S.C. 1372). Finally, while the regulation merely authorizes the observers to conduct research and observe fishing operations, the statute permits a search of any part of the vessel or conveyance, including the hold, the cabin, and the quarters and personal effects (as well as the persons) of those on board.

In sum, there is no inconsistency between 50 C.F.R. 216.24(f) and 16 U.S.C. 1377(d)(2).[3]

b. Contrary to petitioners' suggestion (Pet. 12), it is also apparent that statutory authority exists to issue the regulation. That the Secretary enjoys broad rulemaking power under the Act is unquestioned. Section 1371 grants the Secretary the authority "to determine when, to what extent, if at all, and by what means," the general moratorium imposed by the Act may be waived (16 U.S.C. 1371(a)(3)(A)). Section 1373(a) authorizes the Secretary to prescribe such regulations "as he deems necessary and appropriate to insure that such taking [of species and population stocks of marine mammals] will not be to the disadvantage of those species and population stocks."

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[3] It is also clear that Congress perceived no inconsistency because, as noted, it included a provision in the Act authorizing federal agents from 1972 to 1974 to accompany commercial fishing vessels "for the purpose of conducting research or observing operations" (16 U.S.C. 1381(d)). If that provision was consistent with 16 U.S.C. 1377(d)(2), as Congress must have believed, we fail to see how the present program can be viewed as inconsistent.

Section 1374(b)(2)(D) authorizes the Secretary to include in permits "any * * * terms or conditions which the Secretary deems appropriate." This broad rulemaking authority is amply sufficient to sustain the regulation in question here.

The court of appeals acknowledged (Pet. App. 9a) that the Act does not explicity authorize the Secretary to require a vessel operator, as a condition of securing a permit, to allow an observer to board and accompany the vessel during a voyage. However, the court properly held that the Secretary's broad rulemaking powers included the authority to issue the regulation, which is essential to the effective implementation of the Act (see Pet. App. 9a-12a). See *Haig* v. *Agee*, 453 U.S. 280 (1981) (regulation not authorized "in so many words" by Passport Act upheld); *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980) (OSHA regulation upheld although not explicitly authorized by OSH Act, since it furthered and rationally complemented the Act); *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356 (1973) (regulations promulgated under broad rulemaking authority sustained where reasonably related to purposes of enabling legislation); *Zemel* v. *Rusk*, 381 U.S. 1 (1965) (refusal to validate passport upheld despite lack of specific statutory authorization).

2. Petitioners' primary argument (Pet. 13-18) is that the regulation authorizes searches that violate the Fourth Amendment. The contention is unfounded.

a. First, the observation of fishing operations is not a search. A search occurs only when there is an invasion of a legitimate expectation of privacy. *Oliver* v. *United States*, No. 82-15 (Apr. 17, 1984), slip op. 6. "What a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 251

(1967). Since fishing operations take place in the ocean and on the deck of the vessel, those operations are visible to any person on a nearby vessel or in an aircraft flying overhead. Accordingly, it is difficult to see how those operations could be shielded by a legitimate expectation of privacy.

Moreover, as the court of appeals correctly noted (Pet. App. 7a), the captains have no objection to the observers' scientific role or presence aboard ship as such. Indeed, tunaboat owners and captains *champion* the observer program when it comes to calculating porpoise populations and determining allowable mortality levels. They have brought litigation, pending in the Ninth Circuit (*American Tunaboat Association* v. *Baldrige*, No. 82-5588), demanding that the agency prefer observer data over data from aerial and research ship surveys for all aspects of those calculations. They welcome the "intrusion" for this purpose. The only basis of petitioners' complaint is that observers may report for law enforcement purposes that which they see transpiring on the open ocean.

The observations to which petitioners object are indistinguishable from the warrantless observations approved by this Court in *Hester* v. *United States*, 265 U.S. 57 (1924); *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974), and most recently in *Oliver* v. *United States*, *supra*. In *Oliver*, the Court held that the "open fields" doctrine, first enunciated in *Hester*, permits police officers to enter private property and search a field without a warrant despite the highly secluded setting of the field and the presence of "no trespassing" signs and a locked gate at the entrance. The element of trespass was deemed inconsequential since the landowner had no legitimate expectation of privacy in the field

(*Oliver*, slip op. 11). Here, the observer makes his observations from the deck of a private ship, but that does not convert the observations into a search, since the objects of the observer's attention are visible in the open and may be seen by anyone in the area. "What is observable by the public is observable without a warrant, by the Government inspector as well." *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 315 (1978) (footnote omitted).

Any remaining expectation of privacy on the part of the operators is reduced still further by the pervasive federal regulation of maritime activity in general and commercial fishing in particular.[4] Since tuna fishing is conducted outside territorial waters, tuna boats may lawfully be subjected to a thorough customs search upon leaving and returning to port. Every part of the vessel and every thing and person on board may be searched. Thus there can certainly be no legitimate expectation of privacy with respect to anything on board the vessel at either of those times.

In addition, statutes authorize federal officers to board American vessels even when they are not in port to ensure compliance with various laws. Coast Guard officers have long had the authority to enforce all United States laws on "the high seas and waters over which the United States has jurisdiction" and "[f]or such purposes * * * may at any time go on board of any vessel subject to the jurisdiction, or to

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[4] The commercial fishing industry has been subject to federal regulation since the earliest days of the Nation. *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 272 (1977). The Tuna Conventions Act, 16 U.S.C. 951 *et seq.*, was passed in 1950 and has subjected the tuna fishing industry to special, detailed regulation since at least 1962.

the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel" (14 U.S.C. 89(a)). The courts of appeals have upheld the authority of the Coast Guard, acting pursuant to this provision, to board vessels subject to the jurisdiction of the United States while on the high seas and, at a minimum, to conduct documentation and safety inspections.[5] Customs officers have been granted similar authority over vessels within customs and inland waters (19 U.S.C. 1581(a) and (b)), and this authority has been upheld by this Court (*United States* v. *Villamonte-Marquez*, 81-1350 (June 17, 1983)). In addition, federal and state officers charged with enforcing federal fishing laws may board and inspect fishing vessels at any time (16 U.S.C. 1861(b)(1)(B)). See *United States* v. *Willis*, 639 F.2d 1335, 1337 (5th Cir. 1981); *United States* v. *Raub*, 637 F.2d 1205 (9th Cir.), cert. denied, 449 U.S. 922 (1980). Petitioners' expectation of privacy as boat operators is further diminished by the presence on board of numerous crewmen, who can observe and report all that takes place.

Petitioners maintain (Pet. 11) that a fishing vessel is unlike other pervasively regulated business prem-

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[5] See, *e.g.*, *United States* v. *Watson*, 678 F.2d 765 (9th Cir. 1982) (reasonable where pursuant to administrative plan); *United States* v. *Green*, 671 F.2d 46 (1st Cir.), cert. denied, 457 U.S. 1135 (1982); *United States* v. *Hilton*, 619 F.2d 127 (1st Cir. 1980); *United States* v. *Williams*, 617 F.2d 1063, 1075-1078 (5th Cir. 1980) (en banc); *United States* v. *Harper*, 617 F.2d 35 (4th Cir.), cert. denied, 449 U.S. 887 (1980) (reasonable where Coast Guard patrolling sea lanes); *United States* v. *Warren*, 578 F.2d 1058, 1064-1066 (5th Cir. 1978) (en banc), cert. denied, 446 U.S. 956 (1980). But see *United States* v. *Streifel*, 665 F.2d 414 (2d Cir. 1981) (dictum that reasonable suspicion required).

ises because "a fishing vessel at sea * * * is the fisherman's floating home." That observation does little to restore the fisherman's legitimate expectation of privacy in the face of the inspection statutes noted above, and it is inconsistent with the operators' position that the observers may be present on board for scientific purposes (see Pet. App. 7a). In any event, this is not a suit by sailors who object to the presence of observers in their mess or quarters. It is a suit by tunaboat captains, who lack standing to complain about alleged invasions of their employees' privacy. Furthermore, the regulation at issue here does no more than to authorize the observers to conduct research and observe fishing operations (50 C.F.R. 216.24(f)). It does not purport to authorize a search of the crew's quarters or possessions or other parts of the vessel.

b. Even if the regulation authorizes searches, those searches are reasonable. This Court has determined the reasonablness of searches "by balancing the need to search against the invasion which the search entails." *Camara* v. *Municipal Court*, 387 U.S. 523, 537 (1967); see also *United States* v. *Villamonte-Marquez*, slip op. 9; *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 875 (1975).

Here, the need to place observers on tuna boats is great. As previously noted, before the enactment of the Marine Mammal Protection Act of 1972, more than 300,000 porpoises per year were killed by American tuna fishermen (Pet. App. 3a), and the public interest in preventing the extinction of these magnificent species is strong (see *id.* at 23a). There is also no alternative means of ensuring that the provisions of the Act are obeyed (see *id.* at 20a-21a). And

while the governmental interest served by the regulation is substantial, the invasion of privacy resulting from the observers' monitoring of fishing operations is slight, if not nonexistent, for the reasons detailed above.

Petitioners' attack upon the reasonableness of the provision at issue is based almost entirely upon the fact that it was issued by the Secretary as a regulation rather than enacted in statutory form by Congress. Petitioners maintain that this distinguishes the present case from *Donovan* v. *Dewey*, *supra*; *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), and *United States* v. *Biswell*, 406 U.S. 311 (1972), which also involved inspections, without a warrant or probable cause, of pervasively regulated businesses. Petitioners argue (Pet. 15) that an express statutory authorization is "a *sine qua non* of the exception" embodied in such cases, but neither this Court nor any other court has so held.[6]

Petitioners contend (Pet. 15) that express statutory authorization is necessary because the role played by the magistrate in issuing a warrant must be filled by some branch of government other than the executive. Petitioners state (Pet. 15): "As a separate branch of government and a representative body responsible to the citizens, Congress may with some degree of impartiality and detachment give advance authorization for certain types of warrantless inspection by the executive or enforcement branch * * *." This independent role, petitioners assert (Pet. 16), cannot be performed by the Secretary in issuing regulations.

Petitioners' explanation of the rationale for decisions involving searches of closely regulated businesses

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[6] The Tenth Circuit rejected such an argument in *United States* v. *Rucinski*, 658 F.2d 741 (1981), cert. denied, 455 U.S. 939 (1982).

finds no support in the decisions themselves. This Court has never said that in that situation Congress plays the role of the magistrate. In any event, the discretion of those conducting a search or inspection can be restricted as thoroughly and effectively by regulation as by statute. Petitioners' argument confuses two separate executive functions: the Secretary's rulemaking authority, which must be exercised in accordance with the Administrative Procedure Act, and the authority of agents in the field to make inspections pursuant to the regulations. Once a regulation is duly issued, it can limit administrative inspections as effectively as a statute.

Petitioners maintain (Pet. 16-18) that there is no reason why the government could not obtain administrative warrants prior to placing observers in a tunaboat. But petitioners ignore the fact that the present regulatory scheme gives tunaboat operators far greater procedural protection than they would enjoy if such warrants were obtained. Search warrants are typically sought without notice to the person whose premises are being searched; the proceedings are ex parte; and the search may not be challenged until after it has taken place. Under the present regulatory scheme, by contrast, vessel operators are sent an advance schedule of observer trips and a statement of the authorized scope of observer activities. A tunaboat operator is again notified before an observer is stationed on his vessel, and a predeparture conference is held to discuss what the observer will do. The operator has the opportunity to seek judicial review of a particular scheduled observer trip and to obtain a court order accommodating any relevant privacy interests. See Pet. App. 19a-20a. "Under these circumstances, it is difficult to see what additional protection a warrant requirement would provide" (*Donovan* v. *Dewey*, 452 U.S. at 605).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1984

APPENDIX

Section 103(a) of the Marine Mammal Protection Act of 1972, 16 U.S.C. 1373(a), provides:

> The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, shall prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks) as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in section 1361 of this title.

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